IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ZEM ZEM SHRINERS, A.A.O.N.M.S., an unincorporated association, Plaintiff v. PATRICK H. SCHWINDT, an adult individual, Defendant/Third-Party Plaintiff v. GEORGE HEPLER, DAVID SCHICK and DUANE WILLEY, Third-Party Defendants	)	C.A. No. 05-57E JURY TRIAL DEMANDED

MOTION TO DISMISS

AND NOW, comes the Third-Party Defendant, Duane Willey, by and through his counsel, The McDonald Group, L.L.P., and files this Motion to Dismiss, averring in support thereof the following:

1. This is an action commenced by the Plaintiff to recover monies wrongfully appropriated by the Defendant.

2. The Defendant has filed a complaint as a Third-Party Plaintiff against George Hepler, David Schick and Duane Willey as Third-Party Defendants.

3. There are two paragraphs in the Third-Party Complaint which set forth the apparent premise for the joinder of the Third -Party Defendants. Those are paragraphs 7 and 8.

4. Paragraph 7 reads as follows:

> ***7. During the time period alleged in plaintiff's Complaint, 1997 through February 2003, the third-party defendants***

> ***were involved in maintaining policies and procedures concerning the receipt and management of revenues from bingo and related operations and also had access to those revenues. If revenues were misappropriated or plaintiff sustained a loss of income, which defendant denies, then third-party defendants may be liable to plaintiff on all or part of the plaintiff's claim against the defendant/third party plaintiff.***

Third-Party Complaint, paragraph 7.

5. The Third-Party Defendant, Duane Willey, moves to dismiss the claim asserted against him in paragraph 7 on the ground that it alleges purely a liability to the Plaintiff, the Zem Zem Shriners, A.A.O.N.M.S. Pursuant to Federal Rule of Civil Procedure 14, a third-party defendant may not be joined on a theory of liability to the plaintiff.

6. Paragraph 8 of the Third-Party Complaint against Duane Willey reads:

> ***8. The defendant/third-party plaintiff further requests that third-party defendants indemnify him should he be held liable for any misappropriation of funds.***

Third-Party Complaint, paragraph 8.

7. Duane Willey moves to dismiss the claim asserted in paragraph 8 of the Third-Party Complaint as a cause of action for indemnification only exists where the indemnitor has a primary responsibility for a liability which has for one reason or another been imposed upon the indemnitee. As stated in paragraph 8 of the Third-Party Complaint, the Third-Party Plaintiff, Patrick Schwindt, seeks indemnification for his own misappropriation. There is no premise in Pennsylvania law for the shifting of liability under principles of indemnity under the circumstances as outlined in the Third-Party Complaint.

WHEREFORE, the Third-Party Defendant, Duane Willey, respectfully requests that this Honorable Court dismiss the complaint filed against him by the Third-Party Defendant, Patrick Schwindt.

Respectfully submitted,

THE McDONALD GROUP, L.L.P.

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